

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

BRUSCO TUG AND BARGE, INC.

Employer

and

Case 19-RC-13872

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS,
PACIFIC MARITIME REGION, AFL-CIO

Petitioner

SECOND SUPPLEMENTAL DECISION ON REMAND

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record¹ in this proceeding, the undersigned makes the following findings and conclusions.²

I. Summary

The Employer is engaged in the operation of tugboats on the west coast of the United States. The International Organization of Masters, Mates & Pilots, Pacific Maritime Region, AFL-CIO (hereafter "the Petitioner") seeks to represent a unit of all mates, deckhands, and engineer/deckhands employed by the Employer on vessels operated by the Employer out of its Longview/Cathlamet, Washington homeport. The Employer contends that its mates are statutory supervisors and therefore should not be included in the unit.

This case is on remand to the Region for further appropriate action consistent with *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006); and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006). This

¹ Both parties timely submitted briefs, which were carefully considered.

² The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. The labor organization involved claims to represent certain employees of the Employer and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

remand is limited to the issues of whether mates assign and/or responsibly direct employees, and whether “independent judgment” is required in doing so.³

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. I find that the mates’ assignment and direction duties do not rise to the level to confer supervisory status.

Below, I have set forth the record evidence relating to the Employer’s operations and the factors the Board analyzes in determining assignment and direction duties under *Oakwood Healthcare* and its progeny. Following the record evidence section, I

³ Set forth below is a brief outline of the procedural history of this case.

- October 21, 1999 - initial petition filed.
- November 26, 1999 - D&DE issued finding that a unit composed of all mates, deckhands, and engineer/deckhands to be appropriate.
- December 29, 1999 - the Board denied the Employer’s Request for Review.
- May 2, 2000 - election held and the Union received a majority.
- July 31, 2000 - the Region issued a Second Supplemental Decision on Exceptions adopting the Hearing Officer’s recommendation, inter alia, that the Employer’s challenge to Relief Captain Mark McKinley’s vote be overruled.
- September 6, 2000 - the Board denied review on the Second Supplemental Decision on Exceptions.
- September 22, 2000 - Certification of Representative issued.
- April 11, 2000 - the Board issued a Decision and Order in Case No. 19-CA-26716, finding that the Employer violated Section 8(a)(1) of the Act by promulgating, distributing, and maintaining the following rule: Any mate who participates in any Union organizing campaign, or who encourages any employee to participate in union activities, will be terminated.
- April 25, 2000 - the Employer filed a Petition for Review of the Board’s Decision and Order with the United States Court of Appeals for the District of Columbia Circuit.
- May 1, 2001 - the Court issued its decision denying enforcement of the Board’s Decision and Order. The Court remanded the case to the Board to explain “why its decision in this case is not consistent with [*Local 28, International Organization of Masters, Mates & Pilots*, 136 NLRB 1175 (1962), enfd. 321 F.2d 376 (D.C. Cir. 1963) and *Bernhardt Bros. Tugboat Serv., Inc.*, 142 NLRB 851, enfd. 328 F.2d 757 (7th Cir. 1963)] or alternatively, to justify its apparent departures.” *Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 278 (D.C. Cir. 2001).
- October 24, 2001 - the Board vacated its decision in Case No. 19-CA-26716, and remanded the present case to the Regional Director to reopen the record and for further consideration. The Board, however, did not revoke the Union’s certification.
- January 7, 2002 - The Region issued a Supplemental Decision on Remand finding that the mates were employees.
- October 18, 2002 - the Board granted the Employer’s Request for Review of the Regional Director’s Supplemental Decision on Remand.
- September 29, 2006 - the Board issued its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), *Golden Crest Healthcare Center*, 348 NLRB No. 38 (2006), and *Croft Metals, Inc.*, 348 NLRB No. 38 (2006).
- September 30, 2006 - the Board remanded this case to the Regional Director for further appropriate action, including reopening the record if that was deemed necessary.
- October 25, 2006 - I issued an Order to Show Cause inviting the parties to request a reopening of the record for the purpose of receiving additional evidence and/or supplemental briefs.
- November 15, 2006 - With neither party requesting a reopening of the record, I issued an Order Setting a Due Date for Briefs.

have set forth a section analyzing the record evidence under the analysis of *Oakwood Healthcare*, and the procedures for requesting review of this decision.

II. Record Evidence

The Employer operates its Cathlamet-based tugboats along the Pacific Coast and on the Columbia River. The Employer operates a total of about 34 tug boats and tows a variety of barges and commodities.⁴ Ocean-going tugs are manned by a crew consisting of a captain, a mate, an engineer and a deckhand. There is a second deckhand when a log barge is being towed, as loading and unloading log barges involves additional work. Ocean-going crews typically work rotations of 30 days on, 30 days off. At sea, the crewmembers are on duty during two six-hour watches every 24 hours. The captain and engineer are on watches beginning at 6:00 a.m. and 6:00 p.m. The mate and deckhand are on watches beginning at 12:00 a.m. and 12:00 p.m. The boat is steered by the captain or the mate, depending on who is on duty.

A. The Captain

The captain is the highest authority on the boat. He is responsible for navigation and safety, for ensuring that company policy is followed, that all necessary groceries and other supplies are acquired and on board, that the vessel is sea-worthy, and that the crew is capable of carrying out their duties. The captain decides which crew member will work which 6 hour shift. The captain has the authority to take the boat into an unscheduled port, or to stay in port, if weather conditions so warrant. The captain may put a crewmember off the boat for disciplinary reasons. There is no dispute that the captain is responsible for the boat, crew, barges, and product hauled. Captain Nordstrom testified that if anything goes wrong on the boat, it is the captain who will be held responsible, regardless of who made the call. The Employer's headquarters is generally also readily available by radio.

At the time of the hearing, David Seaberg was the Employer's port captain in Cathlamet. He was responsible for assigning crews to boats. Generally crew members work together on the same boat for long periods of time.⁵ Seaberg always honors captains' requests that a particular individual not be assigned to their respective boats. Captains recommend promotion of mates to captain, and of deckhands to mate.

B. The Mate and Deckhand

During his watch, the mate steers the boat, following a pre-determined course and is responsible for the safety and navigation of the boat. The deckhand, on the same watch as the mate, has the duty of preparing meals for the rest of the crew. The deckhand may also be instructed by the captain or the mate to perform certain routine maintenance tasks, such as chipping and painting.

⁴ These include chip barges, log barges, sand barges, target sleds for the U.S. Navy, dump scows assisting dredging projects, and a self-loading barge for hauling rocks.

⁵ For example, Employer witness Captain Nordstrom testified that he has been working with the same engineer for 5 years, the same mate for 3 years and, the same deckhand for 2 years. Captain Sarff testified that he has worked with the same crew for 2 - 2 ½ years.

C. Engineer

The engineer is responsible for the proper functioning of the mechanical parts of the boat. If there is a malfunction or other problem with the engine during the mate's watch (during which the engineer is off watch), the mate can wake the engineer. The engineer then diagnoses the problem and determines whether it needs to be fixed immediately or if it can wait until his normal watch. Typically, the engineer is deferred to in such matters. The engineer is paid overtime for any time he works "off watch."

D. Making Up a Tow and Docking

Ocean-going tugs generally tow only one barge at a time. On the typical 30-day ocean voyage, a crew will haul four different loads. Connecting a barge to a boat for towing purposes is called "making up a tow." The entire crew participates in making up a tow, and also in docking a barge (bringing a barge into port). Generally, for either of these maneuvers, the captain steers the boat, either from the wheelhouse, or from the "Texas deck," an elevated platform above the wheelhouse from which the captain can steer and operate the winch for the towline, with a better view of the activities. The mate may be stationed either on the deck or on the barge. The mate gives instructions to the deckhand and the engineer with respect to where they should station themselves and which lines to "tie off" (or release) in what order.

When making up a tow, or docking, the crewmembers are each equipped with handheld radios and are all in constant contact with each other. Generally, the captain has, in advance, advised the mate as to what he will be doing with respect to making up a tow or docking, and how the captain wants it done. Other crewmembers may be present during these conversations, or the mate may pass on the instructions later. Crewmembers who have worked together before need little instruction, as each already knows what needs to be done once given the plan.

There are two methods of docking a barge – "hipping up" to the barge, and towing the barge into the dock. The captain decides which method will be used. Hipping up involves moving the tug to the side of the barge, securing the barge tightly alongside the boat, and moving the two to the dock as a single unit. During this procedure, the deckhand boards the barge once the boat is along side, to secure the lines. The captain decides which lines to tie where. Generally, captains like to tie off the lines in a certain order, following the same order every time, such as spring line first, then bow, then stern. The mate also boards the barge, stationing himself at a place of advantageous visibility so he can direct the captain (who is steering the boat) to the dock. Some captains prefer to board the barge themselves and have the mate steer. It is necessary to have someone on the barge because the barge is higher than the boat and blocks the view of the dock.

When the second docking method – towing the barge to the dock – is used, there is usually an assist boat, which takes the mate and the deckhand to the barge. The mate then gives the captain and the assist boat instructions, such as the distance remaining to the dock, whether more or less speed is needed, and whether the assist boat should push or back away.

E. Changing the Length of the Tow Line

On the ocean, conditions such as weather can influence a decision to lengthen or shorten the towline, a decision that can be made by the mate as well as the captain. The procedure involves the mate and the deckhand (or the captain and the engineer) both going to the winch on the Texas deck, where the mate operates the controls while the deckhand watches to make sure that the line is spooling properly.

F. Adverse Weather

In rough seas, the barge may be more safely secured using surge gear, a decision made by the captain. In low visibility conditions, the mate may post the deckhand to keep watch, although this occurs only rarely, as the wheelhouse where the mate would be steering is only 20 feet from the bow.

G. Emergencies and Drills

During his watch, the mate calls out the captain during any unusual circumstances or in an emergency. For example, if the mate thinks that crossing the Columbia River bar is going to be particularly severe, or that the captain will not want to cross, he would call out the captain to make the decision. In any emergency--defined in the record as fire on board, man overboard, or a break in the tow line--the mate would call out the captain. During emergencies, the mate is in charge of the deck and directing the crew, while the captain is on the bridge steering the boat. The mate would give any necessary instructions to the remaining crew, such as to bring a fire extinguisher or water hoses. The boat also has a "station bill" that sets forth what function each crewmember must perform in case of an emergency, such as where they need to be stationed, what equipment they need to bring with them, and what work they will perform. The mates simply make sure that the crew members are following the station bill.

On all vessels, the mate follows the captain's instructions with respect to the frequency and timing of emergency drills: some captains give the mate a free hand in this regard, some captains want certain drills always scheduled at certain times, and some captains do not want any drills at all. During a drill or an actual emergency, the mate is required to call all hands on deck. All crewmembers, including those who are off watch, participate in drills. Those who are off watch receive overtime pay. Obviously, every such drill will require that someone work overtime during the drill.

H. Crossing the Columbia River Bar

On ocean-going voyages, the mate has discretion to slow the vessel down to avoid breaking the tow "wire" (cable), but only the captain can decide to turn the boat around, whether or not to leave port, or whether to go back to port in bad weather. There is contradictory testimony in the record that the mate can decide to go into port in bad weather, and that this may happen on any one boat once or twice during any one winter. The captain also decides what time the boat will get to the "bar" near the mouth of the Columbia River. For example, if the captain decides to arrive at 2:00, the mate will, if necessary, slow down the boat to arrive at 2:00. However, if weather is severe or

there are heavy traffic conditions when the boat is about to cross the bar, the mate will wake the captain for the bar crossing.

I. Projects

In normal circumstances while at sea, there are projects for the deck “crew” to work on that have been assigned by the captain, such as painting or making repairs. Some captains have an established duty roster for the deckhand to follow; others do not.⁶ Depending on the watch, the captain or the mate will instruct the deck crew to work on the project. The deck crew also does cleaning and cooking. A primary reason the deckhand is on the mate’s watch is so that he has time to cook dinner for the captain and engineer. Although Captain Nordstrom testified that he relies on the judgment of the mate in determining the “staffing level needs” during the mate’s watch, such testimony without more is not very instructive, since the mate has few if any choices regarding the “staffing level” on his watch.⁷ Although the record provides no specific instances of a mate having to decide between two deckhands in directing a task, one witness who had worked as a mate testified generally that he would assign tasks according to whom he thought was best qualified. The hypothetical examples he gave were that he would assign the heavier work to the stronger of the two deckhands and he would assign more complex work to the more experienced deckhand.

J. Inland Vessels

Some of the Employer’s vessels ply only the Columbia River. Generally, these vessels make day runs of up to 12 hours, and carry a captain and one crew member. Thus, obviously, there is no supervisory issue for mates on these runs. During the summer of 2001, one vessel made the “fish run”; which involved going a few hundred miles up the Columbia River and passing through several locks. The fish run normally had a crew of four, including the captain and the mate (called the “pilot” on the river). They stood watches just as is done in the ocean-going vessels. When passing through locks or fish runs during the mate’s watch, the mate would give instructions as to which side of the locks to tie up to, which lines to use, and where the deckhand should be stationed.

When passing through locks, certain decisions have to be made by either the captain or the pilot (mate) if a fish run is involved, and the event happens on his watch. Such decisions include whether to tie to the port or starboard side; which lines to tie up, such as a bow line and a stern line; and where to station the deckhand to call out distances on the radio. The lockmaster is stationed on a certain side, and that is generally the side the boat ties up to, so that the “lock slip” (a piece of paper specifying the tonnage and commodities) can be handed to the lockmaster, unless the lockmaster has been called and given the information ahead of time. The wind direction and force

⁶ Captain Nordstrom testified that he has a duty roster that he will show to a new deckhand to let him know what his chores are. Nordstrom explained that his duty roster indicates what duties need to be performed daily, weekly, and monthly. Nordstrom also testified that he knows that a few other captains also have similar duty rosters for the deckhands.

⁷ Generally, there is only one deckhand on board on the mate’s watch.

can also influence the choice of which side to tie up to, as can the cleat configuration in relation to the length of the barge.

On the river, the boats are almost all push boats, rather than tow boats. Push “wires” on the front of the boat are tied to the barge and then cinched up tightly using electric winches on the boat. When traveling, the wires are kept tight, but may be adjusted from time to time, depending on river conditions. During loading or off-loading, the barge moves down or up in the water as cargo is added or removed; thus, the wires have to remain slack so they won’t break. The pilot (mate) instructs the deckhand to tighten or loosen the push wires on the fish run.

K. Accountability

There is no evidence that the mate is disciplined if his “crew” fails, or rewarded if it succeeds. There is no record that any appraisal/evaluation of the mate calls for a review of how his “crew” performs.

III. Application of *Oakwood Healthcare*

As set forth above, this remand is limited to the issues of whether mates assign and/or responsibly direct employees, and whether “independent judgment” is required in doing so. As reiterated in *Oakwood Healthcare*, the burden of proving supervisory status rests on the party asserting that such status exists. *Oakwood Healthcare*, supra, slip op. at 9 (citing *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)).

The Employer contends that its mates exercise supervisory authority under Section 2(11) of the Act in both “assigning” deckhands and in “responsibly directing” them. I address these contentions in turn below.

A. Assign

1) Standard set forth in *Oakwood*

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) term “assign” to mean the act of “designating an employee to a place (such as a location, department, or wing), appointing an individual to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Id.* at slip op. 4. To “assign” for purposes of Section 2(11) “refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” *Id.* at slip op. 4.

2) Mates Not Engaged in Assignment Under *Oakwood*

The Employer contends that its mates “assign” deckhands and engineers as they have “the authority to assign specific tasks to the deckhand during their watch” and decide “whether, on an *ad hoc* basis, to compel those off watch to perform overtime duties.”⁸ The Board’s decision in *Oakwood Healthcare*, is clear, however, that *ad hoc* instruction of an employee to perform a discrete task is not to be considered assignment. As the mate’s duties here regarding instructions to deckhands and

⁸ Employer’s Response to Order to Show Cause at p. 5.

granting of overtime to off watch employees are clearly done on an individual and *ad hoc* basis, these are examples of direction rather than assignment under *Oakwood Healthcare* and I analyze them as such below. See, for example, *Croft Metals, Inc.*, 348 NLRB No. 38, slip op. at 7 (2006), where the Board applying the *Oakwood Healthcare* analysis found that authority to sporadically switch task assignments was more akin to “direction” rather than “assignment” duties.

3) Moreover, No Evidence of Independent Judgment

Moreover, even assuming *arguendo* that these tasks could be considered assignments under *Oakwood Healthcare*, I find that there is no evidence that the mates use independent judgment in making these delegations. With regard to the mates’ authority in instructing the deckhands, there is only one deckhand available to perform the task being assigned the vast majority of the time. As set forth in *Oakwood Healthcare*, *supra*, slip op. at 9, if as here there is only one obvious and self-evident choice, then the assignment is routine or clerical in nature and does not implicate independent judgment. Moreover, the record lacks examples of specific instances where a mate had to choose between two deckhands in directing the performance of a task on those rare occasions where there are two deckhands on the boat.

In addition, with regard to employees incurring overtime, the record shows that the mate will call out the engineer when there is a problem with the engine or the mechanical workings of the boat. As each boat carries only a single engineer, the mate has no discretion as to whom he calls out when there is a mechanical problem on the boat. The only other example of the mate calling out employees when they are off watch is during emergencies and safety drills. As set forth above, the mate is required to call everyone out in either of these situations and, thus, uses no discretion as to whom to call out during emergencies or emergency drills.

B. Responsibly Direct

1) Standard set forth in *Oakwood*

In *Oakwood Healthcare*, the Board interpreted the Section 2(11) phrase “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ (as explained below) and carried out with independent judgment.” *Oakwood Healthcare*, *supra*, slip op. at 6 (internal quotation omitted). The Board, in agreement with several U.S. Courts of appeals, held that, for direction to be “responsible,” the person directing the performance of a task must be accountable for its performance. *Id.* at 6-7. The Board defined the element of “accountability” as follows:

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also *must* be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does

not take these steps. *Id.* at 7. (Emphasis added)

2) Employer's Contentions

The Employer contends that its mates responsibly direct employees in: making up a tow; docking; changing the tow line length; emergencies and emergency drill situations; calling employees off watch; crossing the Columbia River bar; directing deckhands to perform projects; and maneuvering through the locks during inland runs.

As set forth below, I find that the record does not support the Employer's contention that its mates exercise independent judgment in directing employees as is required in the *Oakwood* analysis. Moreover, the Employer has failed to demonstrate that mates are held accountable or potentially accountable in any way for their direction of other employees. In order to make a finding of responsible direction, such accountability must be present. See *Oakwood Healthcare*, supra, slip op. at 6-7.

a) Making Up a Tow and Docking

The entire crew, including the captain, is present for making up the barge and docking. Prior to arrival at the dock to make up the barge, the captain tells the mate (and the rest of the crew either directly, or indirectly through the mate) exactly how the captain wants the maneuver done--down to which lines to tie up first and which side of the dock to approach. Docking a barge is a similarly captain-driven process. During both making up a tow and docking, the entire crew is in communication with each other by radio,⁹ enabling the captain to closely monitor the maneuver's execution. Under such circumstances, I do not find that the mate's role here in carrying out the captain's orders constitutes the use of independent judgment. As set forth in *Oakwood Healthcare*, supra, slip op. at 8, judgment is not independent if it is dictated or controlled by detailed verbal instructions by a higher authority. Moreover, there is no evidence in the record showing that the mate is held accountable in any way for the actions of the deckhand and/or the engineer during making up the tow or the docking process. In fact, Captain Nordstrom testified that if any thing goes wrong during these processes, it is the captain who will be held responsible, regardless of who made the call.

b) Changing the Length of the Tow Line

Deciding to lengthen or shorten the tow line because of weather conditions or some other reason may be a decision requiring independent judgment on the part of the mate, but the record fails to establish that such a decision amounts to *responsible direction of employees*, since it involves the mate himself operating the winch, and the deckhand doing nothing more than watching the line to assure that it is spooling properly. The record does not demonstrate that directing the deckhand in these circumstances is anything more than a routine matter. Moreover, there is no evidence in the record showing that the mate is held accountable in any way for the actions of the deckhand in connection with changing the length of the tow line.

⁹ Although the Employer points out that one witness testified that the engineer does not always have a radio during the process, that witness went on to say that this was because the engineer would be stationed in the wheelhouse next to the captain. Thus, the engineer would obviously be in immediate contact with the captain.

c) Emergencies and Drills

On all vessels, the mate follows the captain's instructions with respect to the frequency and timing of emergency drills: some captains give the mate a free hand in this regard, other captains want certain drills always scheduled at certain times, and some captains do not want any drills at all. During a drill or an actual emergency, the mate is required to call all hands on deck. Thus, whoever is off shift is called out and will receive overtime pay during the drill. The mate does not have discretion on who is called out during a drill. Also, the Employer's witnesses acknowledged that under Coast Guard regulation each boat has a "station bill" that details what function each crewmember must perform in case of an emergency, such as where they need to be stationed, what equipment they need to bring with them, and what work they will perform. In this regard I note that, the Board in *Oakwood Healthcare*, supra, slip op. at 8-9, held that direction which is dictated by an established plan is insufficient to establish independent judgment.¹⁰

The record, as described above, does not establish that mates are required to use any independent judgment in connection with their purported supervisory activities during emergency drills. Although there is evidence that on some boats the mate can decide when the drill will take place, the drill itself is routine and dictated by the directives set out in the station bill. Moreover, even if it was found that the mate's role in determining when the drills take place constitutes independent judgment, there is no evidence that the mates' are held accountable or are in any way potentially responsible for an employees' response during either an emergency or a drill. Rather, just the opposite is true as the Employer's witnesses admitted that it is the captain alone who is responsible for the ship and its cargo.

d) Calling Employees Off Watch

During emergency situations (see footnote 10 below) and emergency drills, and whenever there is a mechanical problem in the engine room on the mate's watch, the mate "calls out" the engineer. The result is "off watch" overtime pay for the engineer. The engineer is called out for every emergency, drill, and mechanical malfunction. The engineer is the one person on board who has expertise in the mechanical and electrical equipment in the engine room, and because the safety of those aboard the vessel, the vessel itself, and its tow depend upon the proper functioning of the engine room equipment, the need for calling out the engineer in cases of malfunction is obvious, and does not require any independent judgment. There are no specific examples in the record of any mate at any time ever weighing the need to call out the engineer against the cost of the overtime thereby accrued. Indeed, the engineer decides whether repairs can be put off or if they need to be fixed right away. Based on the record evidence, the mate exercises little if any discretion in calling the engineer "off watch;" rather such responsibility is of a "routine or clerical" nature not involving the use of independent

¹⁰ As set forth above, the events that count as emergencies are clearly delineated in the record as fire aboard the boat, man overboard, or loss of tow. There is no evidence in the record suggesting that mates have discretion to determine when an emergency exists or to deviate from the emergency plan established pursuant to Coast Guard regulation. See *Oakwood Healthcare*, supra, slip op at 9.

judgment. See *Oakwood Healthcare, Inc.*, supra, slip op. at 9. Moreover, there is no evidence in the record showing that the mate is held accountable in any way for the overtime accrued by the crew members.

e) Crossing the Columbia River Bar

The record establishes that crossing the bar can be more difficult on some occasions than others, and is affected by weather and tidal conditions. The captain decides in advance what time he wants to arrive at the Columbia bar—presumably to encounter more favorable tidal conditions—and instructs the mate in this regard. In circumstances where the weather is particularly severe, such that he may not want to enter the river, the mate will call out the captain to make the decision. There is no specific evidence in the record demonstrating that mates give any particular direction to the deckhands when they are crossing the bar. As the evidence in the record does not establish that the mate *directs employees* using independent judgment when crossing the Columbia bar, such activity does not establish supervisory authority. Moreover, even if the record showed that the mate directed employees while crossing the bar, there is no evidence in the record showing that the mate is held accountable in any way for the actions of the deckhand.

f) Projects

The record reveals that on all of the Employer's boats at issue here, deckhands are responsible for cooking and other maintenance tasks, such as chipping, painting, and general clean up of the boat. Some captains have a detailed duty roster for the deckhand to follow; others do not. There is no dispute that it is the captain who assigns these tasks to the deckhand. The record reveals that the captain may direct the mate to ensure that the deckhand follows through with a specific duty on an ad hoc basis. Examples given on the record were a captain instructing a mate to tell the deckhand to clean up an oil leak or to make sure certain lines were cut in preparation for docking. Such examples fail to demonstrate the mate's use of independent judgment as the mate is just passing on directives of the captain. *Oakwood Healthcare*, supra, slip op. at 8. As set forth above, there is scant evidence regarding those instances¹¹ when a mate might chose between two deckhands to perform a task. The hypothetical example given by an employee who used to work as a mate was that he would assign the heavier work to the stronger of the two deckhands and he would assign more complex work to the more experienced deckhand. I find that the mate's role in making such an assessment of a deckhand's obvious attributes does not rise to the level of independent judgment required to make a finding of supervisory status. Moreover, even if such assessment did rise to the level of independent judgment, the record evidence fails to demonstrate that the mate is held responsible in any way for the proper execution of these tasks. Thus, such direction is not "responsible" under *Oakwood Healthcare*. *Id.* at 7.

¹¹ Only on log barge runs are two deckhands assigned. On balance, the record indicates that the vast majority of the time there is only one deckhand assigned to the sea going tugboats. Moreover, the record shows that even on those log hauling tugboats that have two deckhands, one of those deckhands may be assigned to the captain's watch rather than to the mate's watch.

g) Inland Vessels (the “Fish Run”)

The record establishes that in the summer of 2001 for the first time, one boat was engaged in the “fish run.” River runs normally require only a captain and one crewmember (and therefore do not provide any supervisory opportunity for the Employer’s mates). During the sole fish run, there was a crew of four. At most, this fish run involved perhaps two of the total mates employed by the Employer, for a very limited period of time. This brief unprecedented blip in on-the river experience adds little to evaluating the mate’s responsible direction of the work force, since the norm is to have only a captain and another crew member. Moreover, the record evidence fails to demonstrate that the mate was responsible in any way for the actions of the other deckhands during the “fish run.”

IV. Distinguishing this Case from other Tugboat Cases

I am mindful of *Local 28, International Organization of Masters, Mates and Pilots, AFL-CIO*, 136 NLRB 1175 (*Ingram Tug and Barge*)(1962) [*“Ingram I”*], and *Bernhardt Bros. Tugboat Service, Inc.*, 142 NLRB 851 (1963). In both of those cases, the employers involved operated towboats on the Mississippi River and its tributaries. A tow could include from one up to 15 or more barges, and might stretch ahead of the boat 1,000 feet or more. In both cases, the crew complement was approximately 10 individuals, including the captain. These circumstances were essentially repeated in the more recent *Ingram Barge Company*, 336 NLRB 1259 (2001) [*“Ingram II”*]; *Alter Barge Lines, Inc.*, 336 NLRB 1266 (2001); and *American Commercial Barge Line Co.*, 337 NLRB 1070 (2002). In the *Ingram II*, the Board adopted the Administrative Law Judge’s findings that the facts had not significantly changed since *Ingram I*, where the Board had found the pilots¹² to be supervisors. In the *Alter Barge* and *American Commercial Barge* cases, based on similar facts and findings in *Ingram I* and *Ingram II*, the Board found the *Alter Barge* and *American Commercial Barge* pilots to be supervisors as well.

Although these five cases are somewhat similar to the instant case, they are readily distinguishable for several reasons. First, the number of crew members and tow here is significantly smaller than in the *Ingram* cases. Second, the *Ingram* line of cases involves inland travel through locks, while the instant case involves primarily ocean-going vessels.¹³ Third, unlike the mates at issue here, the pilots in the *Ingram* line of cases directed crew members in complicated maneuvers without the captain’s oversight.

As set forth above, in the instant case, the mate generally directs a single deckhand, while in the *Ingram* riverboat line of cases, pilots direct anywhere from two to five crewmembers. Thus, where a mate in the instant case generally has only one crew member to choose from, a pilot in the *Ingram* cases must use his discretion in deciding who to direct each time an issue arises. In addition, in the instant case there is a

¹² “Mates” and “pilots” are similar positions. On ocean-going vessels, the position is referred to as a “mate.” On inland vessels, the position is referred to as a “pilot.”

¹³ With the exception of the fish run as discussed above.

maximum of two barges being towed (usually only one) whereas *Ingram II* involved as many as 50 barges.¹⁴

In addition, the type of inland travel involved in the *Ingram* line of cases is significantly more complicated than the ocean-going voyages at issue in the instant case. For instance, in the *Ingram* line of cases, as the vessel¹⁵ moved up or down the Tennessee, Ohio, or Mississippi Rivers, barge configurations had to be maneuvered through locks and rearranged when barges were picked up and dropped off. A vessel might include 25 loaded and 25 empty or 15 loaded and 15 empty barges. Barges were placed end on end, side by side, and “wired” together. The addition or subtraction of a barge or a number of barges could result in changing the configuration of the vessel by rearranging the barges due to such things as weight and height of the barge and the overall appearance of the mass of barges. A low barge might take on water over its bow if placed at the head of the mass of barges and an uneven or unsquare mass might result in steering difficulty. I further note from a review of most of the riverboat tug cases that river work involves frequent locking, constant changes in course, regular changes in the river channels, and “traffic” headed in the opposite direction.

In the instant case, with the exception of the isolated fish run, the river work does not involve a crew directed by a mate. On the ocean, the voyage would be much more routine, given the smaller number of potentially impinging vessels, the greater course options, the lack of locks, lack of low bridges, and the ability to generally head on a steady course for long periods.

Moreover, unlike in the instant case, where the captain is on watch anytime a complicated maneuver is executed (e.g., making up a tow, docking, complicated bar crossing), in the *Ingram* line of cases, pilots would direct the multi-person crew in performing complicated maneuvers (e.g., docking, passing through the locks, and even rearranging the barge configuration), *without waking the captain*. Thus, although the mates herein may give some of the same types of instructions to crewmembers as did the pilots in the cited cases (e.g., directing crew members which lines to secure and release), it is clear that: 1) the mates in the instant case mainly act as a conduit relaying information from the captain to the crew; and 2) the degree of judgment required by pilots in the *Ingram* line of cases is significantly greater than that of mates in the instant case, considering both the multiple deckhands that the pilot is directing as well as the complexity of the maneuvers that the pilot undertakes while the captain is off watch.

Accordingly, in consideration of the far larger number of crew members under the pilot’s direction in *Ingram* and its progeny, the relative size and complexity of the tow, and the greater responsibility given to the pilots while they are on watch, it is clear that the degree of judgment exercised by the mates here, is not comparable to that exercised by the pilots in the *Ingram* line of cases.

¹⁴ *Alter Barge Line, Inc.*, supra, at 1267, involved tows of anywhere from 24-40 barges; and *American Barge Lines*, supra, at 1070 fn.5 involved tows of 15 barges.

¹⁵ In this context a “vessel” refers to the towboat and its associated barges.

Moreover, even if the mates here had the same degree of responsibility as the pilots in the *Ingram* cases, there is no record evidence showing that they are held accountable for the actions of the deckhands under their direction as is now required for a finding of responsible direction under *Oakwood Healthcare*. *Id.*, supra, at 7. It is also worth noting that accountability was not explored or relied on in the *Ingram* line of cases. Accordingly, I find that *Ingram* and its progeny are inapposite for our consideration here.

V. Conclusion

In light of the above and the record evidence, I conclude that the Employer has not met its burden in establishing that the mates involved here “assign” or “responsibly direct” employees, utilizing “independent judgment” to a degree exceeding a merely routine or clerical nature.¹⁶ Moreover, there is no evidence that the mates are held accountable for the performance of the crew. Thus, I reaffirm the Certification of Representative that issued in this case on September 22, 2000.

VI. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by 5:00 p.m. EST, on January 4, 2007. The request may not be filed by facsimile.

If a party wishes to file one of these documents electronically, please refer to “E-Gov” on the National Labor Relations Board web site: www.nlr.gov.

DATED at Seattle, Washington, this 21st day of December, 2006.

/s/ Richard L. Ahearn
Richard L. Ahearn, Regional Director
National Labor Relations Board, Region 19
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¹⁶ Moreover, if both the captain and the mate were supervisors, there would be a ratio of one supervisor to each employee aboard the vessel here, which hardly seems likely in circumstances where captains have testified that everyone on board, including the deckhand, generally knows what they are supposed to do and need little direction.